Case No. 02-13009-D
Moise v. Bulger
C-1

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

John Ashcroft, Attorney General of the United States

Marleine Bastien, Executive Director, Fanm Ayisyen Nan Miyami

Peter Michael Becraft, Acting Deputy Commissioner,
Immigration and Naturalization Service

Peterson Belizaire, Petitioner in District Court

David V. Bernal, Attorney for Respondents-Appellees

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Joan A. Lenard, United States District Court Judge

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Case No. 02-13009-D
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Junior Prospere, Petitioner-Appellant

Rebecca Sharpless, Attorney for Petitioners-Appellants

Laurence St. Pierre, Petitioner-Appellant

James W. Ziglar, Commissioner, Immigration and Naturalization Service

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ERNEST MOISE, HEDWICHE JEANTY, BRUNOT COLAS, JUNIOR PROSPERE, PETERSON BELIZAIRE and LAURENCE ST. PIERRE, on behalf of themselves and all others similarly situated, Petitioners-Appellants, v. JOHN M. BULGER, Acting Director for District 6, Immigration and Naturalization Service, JAMES W. ZIGLAR, Commissioner, Immigration and Naturalization Service, JOHN ASHCROFT, Attorney General of the United States, IMMIGRATION AND NATURALIZATION SERVICE and UNITED STATES DEPARTMENT OF JUSTICE, Respondents-Appellees.	No. 02-13009-D **MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE**

PLEASE TAKE NOTICE that the Lawyers Committee for Human Rights (the "Lawyers Committee") hereby moves the Court for leave to file the accompanying brief of amicus in support of Petitioners-Appellants and in support of reversal of the district court's decision. In the brief, the Lawyers Committee advocates for a race- and national origin-neutral construction of the parole statute and regulation consistent with international law. The brief also addresses the adverse effects of prolonged detention on asylum-seekers such as Petitioners-Appellants.

The brief is both desirable and relevant. As an organization that advocates adherence to international refugee protection standards,[1] the Lawyers Committee is well-

[1] The Court is respectfully referred to the Interest Statement section of the accompanying brief for a description of the Lawyers Committee's mission and activities.

positioned to argue the relevance and importance of international law to these proceedings. And as an organization acting directly and through pro bono counsel on behalf of hundreds of detained asylum-seekers, the Lawyers Committee is intimately acquainted with the deprivations imposed on asylum-seekers who are detained.

Petitioners-Appellants consent to this motion. Respondents-Appellees have reserved the right to oppose the motion.

Dated: July 18, 2002

Respectfully submitted

DOUGLAS C. GRAY

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919 Third Avenue
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No. 02-13009-D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ERNEST MOISE, HEDWICHE JEANTY, BRUNOT COLAS, JUNIOR PROSPERE, PETERSON BELIZAIRE and LAURENCE ST. PIERRE, on behalf of themselves and all others similarly situated,

Petitioners-Appellants,

v.

JOHN M. BULGER, Acting Director for District 6, Immigration and Naturalization Service, JAMES W. ZIGLAR, Commissioner, Immigration and Naturalization Service, JOHN ASHCROFT, Attorney General of the United States, IMMIGRATION AND NATURALIZATION SERVICE and UNITED STATES DEPARTMENT OF JUSTICE,

Respondents-Appellees.

On Appeal From The United States District Court
For The Southern District of Florida, Miami Division
Civil Action No. 00-20822-CIV

BRIEF OF AMICUS CURIAE THE LAWYERS COMMITTEE FOR HUMAN RIGHTS IN SUPPORT OF PETITIONERS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT'S DECISION

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INTEREST OF AMICUS

Since 1978, the Lawyers Committee for Human Rights (the "Lawyers Committee") has worked to protect and promote fundamental human rights and to ensure the protection of the rights of refugees, including the right to seek and enjoy asylum. The Lawyers Committee grounds its work on refugee protection in the international standards of the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, and other international human rights instruments, and advocates adherence to these standards in United States law and policy. The Lawyers Committee also operates one of the largest and most successful pro bono asylum representation programs in the country. With the assistance of volunteer attorneys, the Lawyers Committee provides legal representation, without charge, to hundreds of indigent asylum applicants each year. The Lawyers Committee and its volunteer attorneys currently represent more than 900 clients from over 60 countries.

The Lawyers Committee has long advocated for the rights of asylum-seekers detained by the INS. It has issued several reports addressing the deficiencies in the INS's parole procedures for asylum-seekers, urged effective and consistent implementation of parole guidelines for asylum-seekers, and advocated for independent review of INS decisions to detain asylum-seekers. Especially in light of the 1996 changes to United States immigration law, the availability of

parole -- and of a fair, individualized and non-discriminatory process to obtain it -- is of central importance to the Lawyers Committee, its volunteer attorneys, their refugee clients, and all refugees who seek asylum in the United States.

The accompanying brief is both desirable and relevant. As an organization that advocates adherence to international refugee protection standards, the Lawyers Committee is well-positioned to argue the relevance and importance of international law to these proceedings (*see* pp. 5-21 *infra*). Further, as an organization acting directly and through pro bono counsel on behalf of hundreds of detained asylum-seekers, the Lawyers Committee is intimately acquainted with the deprivations imposed on those detained during the asylum process and is able to give voice to those suffering them (*see* pp. 21-27 *infra*).

STATEMENT OF ISSUES

Whether the district court erred in upholding a parole determination standard that does not provide for individualized release determinations made without regard to race and national origin and is therefore inconsistent with the requirements of international law.

SUMMARY OF ARGUMENT

In explaining its unwillingness to disturb or even examine with rigor the government's decision to categorically refuse parole to Haitian asylum-seekers in South Florida, the district court quotes Justice Frankfurter for the proposition

that "no judge writes on a wholly clean slate." R1-65-2 (citing *The Commerce Clause* 12 (1937)). Like many before her, including Justice Frankfurter himself writing for the majority in *Galvan v. Press*, 347 U.S. 522, 530-31(1954), Judge Lenard defers to the "plenary power" doctrine according the political branches far-reaching powers over immigration matters and limits herself to the most cursory review of the government's conduct.

The district court is correct that the slate is not clean in this case, but, contrary to the district court's ruling, that which is written on it favors petitioners. Though the time may come when certain of the oft-criticized precedents on Justice Frankfurter's plenary power slate are wiped clean by the Supreme Court,[1] here the Court need look no further than the Supreme Court's opinion in *Jean v. Nelson* to resolve this dispute. 472 U.S. 846 (1985). In *Jean*, the Supreme Court determined that the facially neutral parole statute and regulation in effect at that time (which were substantially the same as those at issue here) required individualized parole determinations which did not take into account the race or national origin of the asylum-seeker.

[1] "'[S]ince Justice Frankfurter's statement, many other slates have been cleaned,' Why not this one as well?" Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. Pa. L. Rev. 933, 1001 (quoting Louis Henkin, *The Constitution as Compact and Conscience, Individual Rights Abroad and at Our Gates*, 27 Wm. & Mary L. Rev. 11, 29 (1985)).

This construction of the parole provisions articulated in *Jean* calling for individualized and non-discriminatory release determinations remains binding on the government under the circumstances presented, and adherence to *Jean* requires reversal of the district court. Moreover, and in stark contrast to the INS parole policy at issue, this case-specific and non-discriminatory construction is consistent with international law. Under the principles articulated by Justice Marshall in *Murray v. Schooner Charming Betsy*, where "fairly possible" domestic statutes are to be construed consistently with the United States' obligations under international law. 6 U.S. (2 Cranch) 64, 120 (1804). As such, international law's explicit condemnation of deterrence-motivated and discriminatory detention policies such as the one pursued by the INS against Haitians in South Florida is relevant and supportive of petitioners' position.

The government's actions are plainly not in accordance with this governing standard: the deterrence motivations of the policy preclude an "individualized" parole review process and the policy is on-its-face discriminatory. It is therefore respectfully submitted that the district court erred and should be reversed.

In the latter portion of the brief, we seek to highlight the adverse impact detention has on asylum-seekers such as petitioners. Long-term detention

of asylum-seekers has been shown to have a detrimental impact on the well-being of those detained and on their chances of obtaining asylum.

ARGUMENT

A. THE INS'S DETERRENCE-BASED AND FACIALLY-DISCRIMINATORY POLICY IS INCONSISTENT WITH INTERNATIONAL LAW[2]

International instruments which the United States has signed and ratified, including the 1967 United Nations Protocol Relating to the Status of Refugees and the International Covenant on Civil and Political Rights, the norms of international law they embody, and the other international law authorities cited below,[3] permit detention of asylum-seekers only when, *inter alia*, such detention is (i) in accordance with procedures established by law, (ii) "necessary" under the circumstances of an individual asylum-seeker's case, and (iii) applied in a non-discriminatory manner.

---

[2] The relevance of international law to the Court's consideration of petitioners' appeal is discussed at Point B below.

[3] Courts may consult a range of sources in determining the status of international law on a particular issue, including multilateral and regional agreements, interpretive statements of international organizations, the expert opinions of jurists and commentators, decisions of national and international tribunals, and other sources reflecting international customs and practice. *See The Paquete Habana*, 175 U.S. 677, 700 (1900); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820); *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1295 (11th Cir. 1999) (principles of international law to be ascertained *inter alia* from "international conventions, international customs, treatises, and judicial decisions rendered in this and other countries").

These standards are wholly inconsistent with those embodied in the INS's policy and the district court's decision. The central purpose of the INS's parole policy, even as articulated by the INS, is deterrence. *See* Appellants' Br. pp. 23-24.[4] The policy calls for parole determinations to be made, not strictly or even primarily on the basis of the necessity for detention of each of the petitioners -- an analysis focused on the circumstances of the petitioners themselves -- but instead on the national origin of the petitioners and the government's perception of how the *en masse* detention of Haitian refugees in this country might influence the calculus of Haitians considering whether or not to flee Haiti.

The INS's policy, and the construction of the statutory scheme upon which it depends, runs afoul of international law for several reasons. Preliminarily, the INS's policy is plainly not consistent with parole procedures established by domestic law (as interpreted in *Jean v. Nelson*) and hence is also inconsistent with international law. Further, the deterrence rationale underlying the INS's Haitian parole policy is inconsistent with international law's requirement that detention be

[4] The INS officer responsible for petitioners' detention explained that the Miami District Director advised him that INS headquarters initiated the new parole policy "to try to deter a mass exodus from Haiti to the United States." R2-26-5. Similarly, INS Acting Deputy Commissioner Peter M. Becraft stated that he initiated the new policy based on a number of concerns, including "that the U.S. should take steps to discourage Haitians from contemplating dangerous voyages to the United States." R2-25-3.

"necessary" as determined by consideration of the particular circumstances of each asylum-seeker's case (or, put otherwise, "individualized"). Finally, the parole policy is discriminatory and therefore contrary to international law's prohibition on race and national origin discrimination.

1. International Law Permits Detention Only Where "Necessary" as Determined by Review of the Circumstances of Each Individual Asylum-Seeker's Case

The backbone of international refugee law, drafted in the immediate aftermath of World War II, is the United Nations Convention Relating to the Status of Refugees, *adopted* July 28, 1951, *entered into force* Apr. 22, 1954, 19 U.S.T. 6259, 189 U.N.T.S. 137 (the "Refugee Convention"). At the heart of the Refugee Convention is the non-refoulement obligation contained in Article 33, which prohibits state parties from returning a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion."

Though not a signatory to the Refugee Convention, the United States in 1968 greatly strengthened international refugee law by ratifying the 1967 Protocol Relating to the Status of Refugees, *adopted* Jan. 31, 1967, *entered into force* Oct. 4, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (the "1967 Protocol"). The 1967 Protocol expanded the protections of the Refugee Convention and expressly

incorporated and bound the United States to the core obligations set forth in Articles 2 through 34 of the Refugee Convention, including the non-refoulement obligation in Article 33.[5]

At the time the United States ratified the 1967 Protocol, and for over a decade thereafter, no federal statute provided a right to seek asylum in this country. Congress filled this legislative vacuum with its enactment of the Refugee Act of 1980. It is clear that Congress's primary purpose in enacting the Refugee Act was to bring domestic refugee law into conformance with the 1967 Protocol. *See Sale*, 509 U.S. at 176; *Cardoza-Fonseca*, 480 U.S. at 436. To conform United States

[5] Not only is the 1967 Protocol a binding international treaty obligation of the United States, the 1967 Protocol and Refugee Convention are relevant as sources of customary international law and useful for purposes of statutory construction. *See* Point B *infra*. *See also INS v. Cardoza*-Fonseca, 480 U.S. 421, 436-37 (1987); *Aquamar*, 179 F.3d at 1295 (international conventions a source of customary international law); *Alvarez-Machain v. United States*, 266 F.3d 1045, 1051 (9th Cir. 2001) ("international human rights instruments [including unratified and non-self executing treaties] . . . evidence [] customary international law"), *reh'g granted en banc*, 284 F.3d 1039 (9th Cir. 2002); *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 n.9 (2d Cir. 1980) (non-self-executing treaty "evidence of binding principles of international law"). 144 countries are currently parties to the 1967 Protocol, the Refugee Convention, or both. (Status of ratifications available at www.unhcr.ch/html/intlist.htm.) The Refugee Convention has also been determined to have "independent force" as a source of refugee law. *See Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 n.1 (1993) (J. Brennan, dissenting) (citing *INS v. Stevic*, 467 U.S. 407, 428-430 n.22 (1984)). The 1967 Protocol and Refugee Convention may even be considered part of United States immigration law pursuant to 8 U.S.C. § 1101(a)(17) (defining "immigration law" to include all treaties and conventions of the United States relating to immigration).

law with Article 33's non-refoulement obligation, the Refugee Act eliminated distinctions between deportable and excludable aliens for purposes of granting "withholding of deportation" under 8 U.S.C. § 1253(h) and made the grant of such relief (a lesser form of relief than asylum) mandatory upon the Attorney General in appropriate cases. *See Sale* at 175-76; *INS v. Stevic*, 467 U.S. at 416-17. The legislation also provided immigrants with an explicit statutory right to seek asylum and required the executive branch to establish a uniform procedure for adjudicating asylum claims. *Cardoza-Fonseca* at 436.

Of primary significance in the present context, Article 31 of the Refugee Convention (incorporated and made binding on the United States by the 1967 Protocol) exempts refugees from being punished because of their illegal entry or presence and also provides that states shall not restrict the movements of entering refugees more than is "necessary":

> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened . . . enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> 2. The Contracting States shall not apply to the movements of such refugees restrictions *other than those which are necessary* and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.

Refugee Convention, Art. 31 (emphasis added). The provisions of Article 31 apply to asylum-seekers who are awaiting determination of their status as well as to those who have already been determined to be refugees. Office of the United Nations High Commissioner of Refugees, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-seekers*, ¶ 3 (Feb. 10, 1999), available at www.westnet.com.au/jackhsmit/UNHCR_Detention.pdf (hereinafter "UNHCR Detention Guidelines").[6]

The Executive Committee of the United Nations High Commissioner for Refugees (UNHCR), of which the United States is a member, has concluded that detention of asylum-seekers "should normally be avoided" and may only be resorted to "if necessary" and on "grounds prescribed by law" for certain specified reasons relating to the individual asylum-seeker.[7] The UNHCR Detention

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[6] *See also* Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection*, A Paper Prepared at the Request of the Department of International Protection for the UNHCR Global Consultations, ¶ 27 (Oct. 2001) ("this provision would be devoid of all effect unless it also extended, at least over a certain time, to asylum-seekers"), available at www.unhcr.bg/global_consult/article_31_1951crsr_en.pdf.

[7] UNHCR Executive Committee Conclusion on Detention of Refugees and Asylum-seekers No. 44 (1986) ("If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.").

Guidelines similarly provide that, in order to ensure consistency with Article 31, "detention should only be resorted to in cases of necessity." UNHCR Detention Guidelines ¶ 3. A November 2001 roundtable of experts assembled by the UNHCR confirmed that a determination of whether detention is "necessary" for purposes of Article 31 can only be made by considering the individual case of an asylum-seeker:

> [A]ppropriate provision should be made at the national level to ensure that only such restrictions are applied as are *necessary in the individual case*, that they satisfy the other requirements of [Article 31], and that the relevant standards, in particular international human rights law, are taken into account.

Summary Conclusions on Article 31 of the 1951 Convention Relating to the Status of Refugees, Geneva Expert Roundtable: Organized by the UNHCR and Graduate Institute of International Studies (Geneva: Nov. 8–9, 2001), available at www.westnet.com.au/jackhsmit/roundtable-summaries.pdf (emphasis added) (hereinafter "Summary Conclusions").

Sources of international human rights law, a broader body than refugee law, confirm that detention of asylum seekers should only be permitted on a case-by-case basis. The International Covenant on Civil and Political Rights ("ICCPR"), ratified by the United States in 1992, formally codifies a number of the rights set forth in the Universal Declaration of Human Rights. Article 9 of the document provides that:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

ICCPR, *adopted* Dec. 19, 1966, *entered into force* March 23, 1976, G.A. res. 2200A (XXI), U.N. Doc. A/6316, 999 U.N.T.S. 171.[8] *See also* Universal Declaration of Human Rights,[9] *adopted* Dec. 10, 1948, U.N.G.A. Res. 217A (III), U.N. Doc. A/810, Art. 9 ("everyone has the right to life, liberty and security of person," and "no one shall be arbitrarily arrested, detained, or exiled");

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[8] The ICCPR, which has been ratified by 148 countries (*see Status of Ratifications of the Principle International Human Rights Treaties* (Jul. 10, 2002), available at www.unchr.ch/html/menu3/b/a_ccpr.htm), formally codifies a number of the rights set forth in the Universal Declaration of Human Rights. The ICCPR, a binding treaty obligation of the United States, has also been consulted as a source of customary international law and, as at Point B *infra*, used in construing domestic law. *See, e.g., Beharry v. Reno*, 183 F. Supp. 2d 584, 603 (E.D.N.Y. 2002). As recently as December 1998, the President confirmed the United States' commitment to the ICCPR by issuing Executive Order No. 13107, 63 FR 68991 (Dec. 10, 1998): "It shall be the policy and practice of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights agreements to which it is a party, including the [ICCPR] . . ."

[9] The Universal Declaration of Human Rights, though not a treaty, is a well-recognized and respected articulation of human rights that can be valuable in statutory construction. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) (Universal Declaration an "authoritative statement of the international community"); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981). *See also* Restatement (Third) of Foreign Relations Law § 701, cmt. d ("It is increasingly accepted that [parties] to the [United Nations] Charter are legally obligated to respect some of the rights recognized in the Universal Declaration.").

Restatement (Third) of Foreign Relations Law § 702 ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention."). As with Article 31, the ICCPR looks beyond the technical legality of the detention under domestic law, presupposing a fair review of the circumstances of the individual to determine the necessity of detention. *See* Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel: 1993), p. 172 ("It is not enough for deprivation of liberty to be provided for by law. The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily.")

The United Nations Human Rights Committee recently had occasion to explore refugee detention under international law when it offered its opinion on the detention for over four years of a Cambodian refugee in Australia. In accordance with the ICCPR, the Committee concluded that detention should be considered arbitrary when it was not necessary in light of all the circumstances of the individual asylum-seeker's case:

> The Committee recalls that the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not *necessary in all the circumstances of the case*, for example to prevent flight or interference with evidence:

> the element of proportionality becomes relevant in this context . . .
>
> * * *
>
> [E]very decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed.

UN Human Rights Committee, A. v. Australia, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997), available at www.unhchr.ch/tbs/doc.nsf/ ("jurisprudence" library) (emphasis added).

Pursuant to the above authorities, international refugee and human rights law permits detention of an asylum-seeker only, *inter alia*, where such detention is pursuant to law, and just, appropriate and necessary in the circumstances of the individual case. Detained asylum-seekers should be provided not only a fair determination of their claims, but also a fair determination of the necessity of their detention.

2. Detention for Deterrent Purposes Is Prohibited Under International Law

As a policy bottomed on deterrence, the Haitian/South Florida parole policy by definition precludes the fair and individualized review of the necessity for detention called for by, *inter alia*, the 1967 Protocol and ICCPR, and, as various authorities reviewing the issue have agreed, is inconsistent with international law.

In its formal detention guidelines, and in other pronouncements, the UNHCR has repeatedly emphasized that detention of asylum-seekers for the purpose of deterrence is contrary to the norms of international refugee law. The UNHCR Detention Guidelines, as revised in February 1999, specifically state that:

> Detention of asylum-seekers which is applied … as part of a policy to deter future asylum-seekers is contrary to the principles of international protection. Under no circumstances should detention be used as a punitive or disciplinary measure for failure to comply with administrative requirements or breach of reception center, or refugee camp or other institutional restrictions.

UNHCR Detention Guideline 3. *See also* UNHCR, *Note on International Protection*, A/AC.96/643, ¶ 29 (Aug. 9, 1984) (while detention may be justified both with regard to individual asylum-seekers or a large-scale influx, this is not the case where asylum-seekers are detained with the sole object of deterring further arrivals), available at www.unhcr.ch.

Most recently, in its April 15, 2002 advisory opinion on the INS's detention of asylum-seekers in South Florida -- issued in response to inquiries regarding the propriety of the INS's Haitian/South Florida parole policy -- the UNHCR emphasized that "[t]he detention of asylum-seekers in furtherance of a policy to deter future arrivals does not fall within any of the exceptional grounds for detention and is contrary to the principle underlying the international refugee

protection regime" and that "detention for the purpose of discouraging further arrivals cannot be justified." R2-40-Ex. 1 at 5.

Expert commentators on refugee law have also concluded that detention for deterrent purposes is inconsistent with international law. *See* Guy S. Goodwin-Gill, *International Law and the Detention of Refugees and Asylum-seekers*, International Migration Review, Vol. 20, No. 2 (1986) ("The detention of refugees and asylum-seekers is never an appropriate solution to their plight. The power to detain must be related to a recognized object or purpose, and there must be a reasonable relationship of proportionality between the end and the means. Detention as part of a program of "human deterrence" is unlikely ever to be either legitimate or humane."); Arthur C. Helton, *The Legality of Detaining Refugees in the United States*, 14 N.Y.U. Rev. Law & Soc. Change 353, 372-80 (1986); Arthur C. Helton, *Detention of Refugees and Asylum-seekers: A Misguided Threat to Refugee Protection*, in Gil Loescher, *Refugees and International Relations* (Oxford Univ. Press, Oxford: 1989) ("Detention for purposes of deterrence . . . is legally questionable under Articles 31 and 33 of the United Nations Convention and Protocol Relating to the Status of Refugees, which prohibit the imposition of penalties and restrictions on movements, as well as refoulement."). In fact, the expert roundtable convened by the UNHCR in November 2001 to examine issues relating to Article 31, specifically concluded that "[r]efugees and asylum-seekers

should not be detained . . . for the purposes of deterrence." Summary Conclusions ¶ 11(c).

3. International Law Proscribes Discriminatory Detention Practices

The principle of non-discrimination is central to both international refugee law and international human rights law. Article 3 of the Refugee Convention (incorporated through the 1967 Protocol) requires signatory nations to "apply the provisions of [the] Convention to refugees without discrimination as to race, religion or country of origin." In accordance with this central tenet, the UNHCR Detention Guidelines recommend that any decision to detain an asylum-seeker should "only be imposed in a non-discriminatory manner." UNHCR Detention Guideline 3. The November 2001 expert roundtable convened by UNHCR agreed, concluding that "[r]efugees and asylum-seekers should not be detained on the grounds of their national, ethnic, racial or religious origins . . ." Summary Conclusions ¶ 11(c).

Consistent with the 1967 Protocol and Refugee Convention, the ICCPR obliges all contracting states to ensure to "all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind . . ." ICCPR, Art. 2(2). The ICCPR also specifies that this principle of non-discrimination includes national or social origin, birth or other status:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICCPR, Art. 26. States like the United States who have committed to abide by the ICCPR are thus required to prohibit racial and national origin discrimination, including in their detention policies.

The INS's plainly discriminatory policy of detaining Haitians *en masse* and the interpretation of the parole provisions underlying it are contrary to the terms of these instruments and inconsistent with international law.

B. INTERNATIONAL LAW IS RELEVANT AND REQUIRES INDIVIDUALIZED PAROLE DETERMINATIONS MADE WITHOUT REGARD TO RACE OR NATIONAL ORIGIN

The Supreme Court in *Jean v. Nelson* interpreted the facially neutral parole statute and regulation to require that INS officials make "individualized determinations of parole . . . without regard to race or national origin." *Jean*, 472 U.S. at 857. This construction of the parole provisions -- *i.e.*, an interpretation calling for "individualized" determinations made in a non-discriminatory manner -- comports with international law's requirement that the "necessity" of detention be

considered in view of the circumstances of the individual applicant and its prohibition on discriminatory detention of asylum-seekers.

It is settled that where multiple constructions are "fairly possible," federal statutes are to be construed in a manner that harmonizes domestic and international law. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 120 (harmonizing domestic law with customary international law); *Chew Hong v. United* States, 112 U.S. 536, 540 (1884) (harmonizing domestic law with treaty obligations between United States and China); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (harmonizing domestic law with international agreements between the United States and the Philippines); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir. 1986); *United States v. Marino-Garcia*, 679 F.2d 1373, 1380 (11th Cir. 1982) ("even had the intent of Congress been less than pellucid, the Supreme Court has long admonished that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . .'") (citing *Charming Betsy*); Restatement (Third) of Foreign Relations § 114. Moreover, Congress may be assumed to be aware of, and not to have overridden, international law in the absence of a "clear statement" to this effect. *See Weinberger*, 456 U.S. at 32 ("some affirmative expression of congressional intent to abrogate the United States' international obligations is required"); Restatement (Third) of Foreign Relations Law § 115(1)(a). These principles of construction support application

here of the non-discriminatory and individualized interpretation of the parole provisions articulated in *Jean*.[10]

Importantly, and unlike *Garcia-Mir*, this is not a situation in which there is a "controlling executive or legislative act or judicial decision" that precludes consideration of international law. *See Garcia-Mir*, 788 F.2d at 1453. The "controlling" legislative act and judicial decision here are the neutral parole statute and *Jean*, which require non-discriminatory, individualized parole review. And the only executive conduct in this case is that of mid-level INS officials,[11] action insufficient to trigger preclusion of international law.[12]

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[10] The district court, in declining to consider arguments rooted in international law, noted only that petitioners have not asserted claims arising under international law (which neither petitioners, nor amicus has contended) and that the 1967 Protocol and ICCPR are "non-self-executing" -- a point not at issue in this case as there is no asserted private right of action under any treaty. R2-65-7 n.6. In any event, the self-executing/non-self-executing distinction identified by the district court does not affect a United States court's ability and obligation to use treaties and other sources of international law to interpret domestic law in a manner consistent with international law; nor does it excuse the United States from its obligations, extending to other treaty parties, to comply with treaties which it has executed and ratified. *See* Richard B. Lillich, *The Role of Domestic Courts in Enforcing International Human Rights Law*, in *Guide to International Human Rights Practice*, 228, 240 (Hurst Hannum ed., 2d ed. 1992).

[11] *Garcia-Mir* is readily distinguishable on this issue. There, the Court determined that the Attorney General (acting pursuant to authority delegated by Congress and in a manner consistent with relevant statutes), not just the President, had the authority to terminate status review of Cuban nationals. *Id.* at 1454. The Court found that *The Paquete Habana*, 175 U.S. 677 (1900), did not preclude cabinet level officials from performing controlling executive acts, but instead supported
(footnote continued)

For these reasons, the dictates of international law are relevant, supportive of petitioners' position, and call for reversal of the district court.

C. DETENTION SEVERELY IMPACTS ASYLUM-SEEKERS SUCH AS PETITIONERS

Though obtaining official information about the detention of asylum-seekers has proven difficult,[13] the press, human rights groups, medical practitioners and faith-based organizations have documented the harsh impact of detention on individual detainees.[14] A wide range of experts have concluded that detention is

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the position that "[a]t best . . . lower level officials cannot by their acts render international law inapplicable." *Id.* Notably, the "lower level" official in *The Paquete Habana* was an Admiral in the United States Navy.

[12] These same issues foreclose reliance on *Cuban American Bar Association, Inc. v. Christopher*, 43 F.3d 1412 (11th Cir. 1995). In that case, as in *Garcia-Mir*, the Attorney General herself, acting pursuant to and consistent with statute, issued the subject policy. *Id.* at 1427.

[13] For years, in fact, the INS has been unable to regularly provide statistical information relating to detained asylum-seekers -- even in the face of a federal statute requiring the INS to report these numbers to Congress. 8 U.S.C. § 1378 (1998) (requiring the Attorney General to submit an annual report to the Committee on the Judiciary containing data on detained asylum-seekers, including total number of detainees, location of each detainee by facility, gender of such detainees, and average length of detention); Frederick N. Tulsky, *Uncertain Refuge: Asylum-seekers Face Tougher U.S. Laws, Attitudes*, San Jose Mercury News, Dec. 10, 2000 (INS lacks precise data on detained asylum-seekers).

[14] *See* Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States* (Sept. 1998), available at www.hrw.org/reports98/us-immig/; Lawyers Committee for Human Rights, *Refugees Behind Bars: The Imprisonment of Asylum-seekers in the Wake of the 1996 Immigration Act* (1999), available at
(footnote continued)

often detrimental to the well-being of asylum-seekers, and further that it significantly impairs asylum-seekers' access to counsel and otherwise interferes with their ability to pursue their asylum claims.

1. Impact of Detention on Survivors of Rape, Torture and Other Traumatic Experiences

Detention can be particularly difficult for the many asylum-seekers who are survivors of rape, torture and other traumatic experiences. As one specialist has noted: "Most refugees have been exposed to high levels of violence and other types of traumatic events in their country of origin and during their journey to their host country."[15] Medical experts have documented the fact that many of these refugees suffer from post-traumatic stress disorder (PTSD), major depression, or other illnesses.[16] Refugees also have to contend with "a general

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www.lchr.org/refugee/behindbars.htm; Women's Commission for Refugee Women and Children, *Forgotten Prisoners: A Follow-Up Report on Refugee Women Incarcerated in York County, Pennsylvania* (July 1998). *See also* Lisa Getter, *Freedom Elusive for Refugees Fleeing to the U.S.*, Los Angeles Times, Dec. 31, 2001; Mirta Ohito, *Inconsistency at INS*, New York Times, June 22, 1998.

[15] Catherine J. Locke, et al., *The Psychological and Medical Sequelae of War in Central American Refugee Mothers and Children*, 150 Archives of Pediatrics & Adolescent Med. 822, 823 (1996).

[16] Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 Geo. Immigr. L.J. 1, 49 nn.272-73 (Fall 2001) (citing numerous medical reports, including, Neal R. Holtan, *Survivors of Torture*, 114 Pub. Health Rep. 489 (1999); Derrick Silove, *et al.*, *Anxiety, Depression and PTSD in Asylum-Seekers: Associations With Pre-Migration Trauma and Post-Migration Stressors*, (footnote continued)

feeling of isolation and helplessness; most asylum-seekers have been forced to flee their homes, jobs, friends, family and social networks to a country whose language they do not speak and whose customs they do not understand."[17]

For refugees who are suffering from PTSD and depression, detention is retraumatizing and can exacerbate their suffering. As one expert explained: "For someone who's been tortured and locked up in a cell as a political prisoner in their native countries . . . the experience of being locked up here again can trigger panic attacks, flashbacks."[18] The continued incarceration of such asylum-seekers severely impairs their ability to overcome PTSD and in many cases exacerbates their condition. Dr. Allen Keller, Director of the Bellevue/NYU Program for Survivors of Torture and member of the Executive Committee of the National Consortium of Torture Treatment Programs, explains:

> Imprisonment and treating asylum-seekers like criminals is retraumatizing and can have harmful effects on their

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170 British J. Psychiatry 351, 351-57 (1997); Hans Thulesium and Anders Hakansson, *Brief Report: Screening for Posttraumatic Stress Disorder Symptoms Among Bosnian Refugees*, 12 J. Traumatic Stress 167, 171-73 (1999)).

[17] Michele R. Pistone, *Justice Delayed Is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum-seekers*, 12 Harv. Hum. Rts. J. 197, 208 (Spring 1999).

[18] Elizabeth Llorente, *Dreams Turn to Despair*, The Bergen County Record, May 24, 1999 (quoting Dr. Beverly Pincus, Director of Cross-Cultural Counseling Center at the International Institute of New Jersey).

> physical and emotional well being . . . Imprisonment and such deprivation can result in exacerbating disturbing memories and nightmares of abuse the asylum-seekers had suffered previously. Depression can be caused by detention and feelings of isolation, hopelessness and helplessness. Asylum-seekers may experience worsening of physical symptoms, including musculoskeletal pain, because of their restricted activity. Somatic symptoms, such as headaches, stomach aches and palpitations can also result from detention.[19]

Detention can thus lead to grave harm as "the anxiety, fear, and frustration provoked by detention may prolong and exacerbate underlying traumatic stress reactions and thereby create long-term psychosocial disability."[20]

2. Impact of Detention on Asylum-Seekers' Ability to Present Their Asylum Claims

Detention undermines the ability of asylum-seekers to obtain legal representation and thus the ability to prepare and effectively present their claims. Finding legal representation can be extraordinarily difficult for a detainee, who usually is also dealing with serious linguistic, fiscal and cultural barriers. As the UNHCR has stated: "Detention creates numerous obstacles for asylum-seekers. Detained asylum-seekers are often unable to secure counsel, have difficulty

[19] Statement of Allen S. Keller, M.D. before the Senate Judiciary Subcommittee on Immigration, Hearing on Asylum Policy (May 3, 2001), available at www.phrusa.org/research /refugees/testimony.html.

[20] Derrick Silove, et al., *Detention of Asylum-seekers: Assault on Health, Human Rights, and Social Development*, The Lancet, Vol. 357, May 5, 2001.

communicating with family members, and have limited access to legal materials and interpreters to assist them in preparing their claims."[21] Statistics on detention analyzed by Georgetown University's Institute for the Study of International Migration indicate that in 1999 detained asylum-seekers in defensive proceedings were significantly more likely to be unrepresented than similarly situated non-detained asylum-seekers (70% vs. 86%, on a national basis), a weighty statistic given that asylum-seekers were four to six times more likely to be granted asylum when represented.[22]

Even when a refugee is able to locate a lawyer, detention is a considerable burden on both lawyer and client. The ability of the attorney and client to meet to prepare the asylum case can be severely impinged by detention.[23] And some immigration judges, citing the cost to the government of detaining

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[21] Lawyers Committee for Human Rights, *Refugees Behind Bars*, *supra* note 14, at 34 (citing Letter from UNHCR Regional Representative, dated Sept. 15, 1998, to Senator Spencer Abraham, Senate Sub-Committee on Immigration in connection with INS oversight hearings on detention).

[22] *Asylum Representation, Summary Statistics*, prepared by Dr. Andrew I. Schoenholtz, Director of Law and Policy Studies, Institute for the Study of International Migration, Georgetown University (May 2000).

[23] Human Rights Watch, *Locked Away*, *supra* note 14 ("Incarceration far from friends and family who can locate and pay for lawyers, frequent transfers from facility to facility, restrictive visitation policies and limited telephone access create significant obstacles to adequate representation. The remote location of local jails -- sometimes hundreds of miles away from an urban center -- permits only infrequent visits by attorneys of record for interviews and case preparation.").

asylum-seekers, refuse to adjourn cases sufficiently to allow attorneys adequate time to gather evidence and prepare their clients' cases.[24]

Detention ultimately poses a significant obstacle to the just resolution of an asylum-seeker's claims, an interest shared by all parties. As Professor Pistone, Director of Villanova University School of Law's Clinic for Asylum, Refugee and Immigrant Services, has written:

> Detention adversely impacts an asylum-seeker's ability to find and hire counsel, to prepare and present an asylum claim, and to provide credible and detailed testimony. The cumulative effect is to undermine the ability to achieve the ultimate goal of the process -- to distinguish between deserving and undeserving asylum applicants, and to grant protection to deserving applicants. This state of affairs is particularly lamentable given that the stakes are so high.[25]

Parole is often regarded as relief separate and distinct from the asylum adjudication process. It is not. The consequences of the INS's South

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[24] Sufferers of PTSD are particularly compromised in their ability to present asylum claims if subject to detention. For sufferers of PTSD, "describing prior [traumatic] events under any circumstances can evoke symptoms of anxiety including fear, nervousness, palpitations, and dizziness." Keller, *supra* note 19. Thus, victims of trauma, without proper recovery, are often loath to recount past traumatic events. *See* Am. Psychiatric Ass'n, Diagnosis and Statistical Manual of Mental Disorders § 309.81, at 465 (4th ed. 2000). An asylum-seeker's ability to deliver a clear narrative about past traumatic events (to counsel, in an application, or during immigration court proceedings) is often determinative. As incarceration prolongs and exacerbates the effects of PTSD (*see* discussion *supra*), the ability of those suffering from it to effectively present their claims is further diminished.

[25] Pistone, *supra* note 17 at 215.

Florida/Haitian policy are profound, with respect to the direct suffering caused to formerly parole-eligible asylum-seekers like Petitioners, and also with respect to the adverse impact detention has on the ability of such asylum-seekers to prosecute their asylum claims.

CONCLUSION

For the above reasons, the Lawyers Committee respectfully submits that this Court should reverse the district court's ruling and grant the Petitioners-Appellants the relief they seek.

Dated: July 18, 2002

Respectfully Submitted,

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Certificate of Compliance With FRAP 32

I certify that pursuant to Fed. R. App. P. 32(a)(7) and 11th Cir. R. 32-4, the attached Brief of Amicus Curiae Lawyers Committee for Human Rights contains 6586 words, including footnotes, but not including the cover, table of contents, table of authorities and certificates of interested persons, compliance and service.

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Certification of Bar Membership

I, Douglas C. Gray, certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Eleventh Circuit.

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Certificate of Service

I hereby certify that on July 18, 2002, two true and correct copies of (i) Motion of the Lawyers Committee for Human Rights for Leave to File Brief Amicus Curiae, (ii) proposed Brief of Amicus Curiae Lawyers Committee for Human Rights, and (iii) Notice of Appearance for the undersigned counsel, were mailed by federal express postage prepaid to counsel for the parties at each of the following addresses:

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ERNEST MOISE, HEDWICHE JEANTY, BRUNOT COLAS, JUNIOR PROSPERE, PETERSON BELIZAIRE and LAURENCE ST. PIERRE, on behalf of themselves and all others similarly situated, Petitioners-Appellants, v. JOHN M. BULGER, Acting Director for District 6, Immigration and Naturalization Service, JAMES W. ZIGLAR, Commissioner, Immigration and Naturalization Service, JOHN ASHCROFT, Attorney General of the United States, IMMIGRATION AND NATURALIZATION SERVICE and UNITED STATES DEPARTMENT OF JUSTICE, Respondents-Appellees.	No. 02-13009-D

MOTION OF THE LAWYERS COMMITTEE FOR
HUMAN RIGHTS FOR LEAVE TO FILE BRIEF AMICUS CURIAE